# Petition

81-1092

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No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JAMES L. WILLIAMS, L. C. ALLEN,
WILLIAM J. BALES, THOMAS COLLINS,
ROY DAVISON, RALPH DODD,
HAROLD GEORGE, C. J. HARPER,
WALLACE HOUSTON, FRANKLIN KYLE,
WILLIAM ROBERSON, HERSCHEL VAUGHN,
*Petitioners,*

v.

GENERAL MOTORS CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether or not an "ADEA" Plaintiff seeking a redress for job modification against an employer who has made a large reduction in work force must show as an element of his prima facie case that "the employer intended to discriminate in reaching the decision at issue"?
2. If discriminatory intent is a necessary element of a prima facie "ADEA" case involving reduction in work force, whether or not Plaintiffs' Seventh Amendment Constitutional rights to a trial by jury were abrogated by the Circuit Court's ruling that Plaintiffs had failed to introduce

sufficient evidence of such discriminatory intent so as to mandate the granting of Defendant's motion for judgment notwithstanding the verdict, when:

(a) Documentary evidence proved that many of Defendant's employees outside the protected age group were transferred to salaried positions the duties of which all Plaintiffs testified that they could have performed as well as or better than those younger employees; and

(b) Defendant's superintendent, Bob Sackerman, testified that age was taken into account in making personnel reductions?

3. Whether or not recovery in an "ADEA" action must be reduced by any amount of vacation pay received by the "ADEA" plaintiff at the time of his job reduction?

4. Whether or not a private litigant is entitled to recover general damages for pain and suffering in a private action brought under the "ADEA" of 1967?

5. Whether or not a private litigant is entitled to recover purnitive damages in a private action brought under the "ADEA" of 1967?

6. If Plaintiffs' proof of a prima facie case is sufficient, whether or not an injunction should have issued in view of the jury's

awarding backpay and liquidated damages?

7. If Plaintiff's proof of a prima facie case is sufficient, whether or not attorney's fees reasonably covering the hours expended by Plaintiffs' attorneys should have been awarded?

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COME NOW the Petitioners, JAMES L. WILLIAMS, L. C. ALLEN, WILLIAM J. BALES, THOMAS COLLINS, ROY DAVISON, RALPH DODD, HAROLD GEORGE, C. J. HARPER, WALLACE HOUSTON, FRANKLIN KYLE, WILLIAM P. ROBERSON, and HERSCHEL VAUGH and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 14, 1981.

## OPINIONS DELIVERED

The opinion of the District Court for the Northern District of Georgia is unreported. The opinion of the Court of Appeals for the Fifth Circuit is reported at 656 F2d 120. Both opinions are appended to this Petition in the Appendix

at pages A-1, A-12, A-14, A-16, A-45, A-66 and A-86, respectively.

## JURISDICTIONAL GROUNDS

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The pertinent portions of 29 U.S.C. §621 et seq. are set forth in the Appendix on pages A-149 - A-151.

## STATEMENT

In January, 1975, Plaintiffs were employed by the General Motors Corporation (GM) in salaried, supervisory positions at

two (2) Atlanta-area plants, one located on Lakewood Avenue in the city and the other located in Doraville, Georgia. At about this time, GM eliminated one of two shifts in operation at each plant, leaving three (3) Plaintiffs jobless and relegating the others to hourly wage employee status. The effect of this action on the size of the salaried, supervisory staff at the two (2) plants was profound in that personnel was cut by approximately 50%.

On May 30, 1975, fifteen (15) of the Plaintiffs in this case filed a complaint alleging violations of the "ADEA" by Defendant, GM, seeking backpay, liquidated damages, damages for pain and suffering, punitive damages, injunctive relief, and

attorney's fees.

Upon Defendant's motion prior to trial, the District Court struck Plaintiffs' amendment seeking damages for pain and suffering and punitive damages.

The case proceeded to trial and at the close of Plaintiff's case, Defendant moved for a directed verdict against fifteen (15) of the Plaintiff's, alleging two (2) shortcomings: failure by Plaintiff's, Collins and Johnson, to establish any monetary loss resulting from their job reduction in that they had both taken sick leave at about the time of job reduction, and failure by fifteen (15) Plaintiffs to offer proof that they were replaced by persons outside the age group protected by the "ADEA". The District Court granted the

motion as to Collins and Johnson, but declined to rule on the motion as to the other fifteen (15) Plaintiffs. The jury returned a verdict awarding back pay and liquidated damages to all seventeen (17) Plaintiffs. Defendant moved for a Judgment N.O.V. and on June 19, 1979, the District Court granted the motion in part by ordering that all amounts received as vacation pay by each successful Plaintiff be deducted from his award of back pay and liquidated damages. As to the vacation pay received by the Plaintiffs in question, GM contended that any verdicts should be reduced by the vacation pay received along with a corresponding reduction in liquidated damages. On the other hand, Plaintiffs contended that the vacation pay

had been earned from the prevous year's work, and that they were entitled to either vacation or pay regardless of the job modifications which occurred. Plaintiffs contended that GM had elected to pay vacation pay at the time of the job modifications, rather than granting the paid vacations and, then, making the job modifications.

One July 18, 1979, the trial court conducted a hearing pertaining to the injunctive relief sought by the Plaintiffs and entered an order on September 6, 1979, denying the same. On November 1, 1979, the trial court conducted an evidentiary hearing pertaining to the prayers of Plaintiffs' attorneys for attorneys' fees of $126,640.00 for prosecution of the case

and, on February 11, 1980, awarded attorneys' fees in the amount of $14,669.85.

## BASIS OF JURISDICTION OF THE DISTRICT COURT

The United States District Court for the Northern District of Georgia had jurisdiction of the instant case by virtue of United States Code, Title 29, §633(c).

## REASONS FOR GRANTING THE WRIT

29 U.S.C. §626(b) makes provision for the awarding of liquidated damages if the finder of fact determines that the employer willfully discriminated. The "ADEA" does not require any such proof of willfulness in order to merely recover backpay damages under §626(c). The impo-

sition made by the Circuit Court requiring the "ADEA" Plaintiffs to show that "the employer intended to discriminate in reaching the decision at issue" infuses the requirements of 29 U.S.C §626(b), providing for liquidated damages, into 29 U.S.C. 626(c), providing for legal relief. This, in effect, renders impossible any recovery by an "ADEA" Plaintiff of his backpay unless he is also entitled to liquidated damages.

This confusion between the requirements of §626(b) and §626(c) only applies to the "ADEA" case involving reduction, and not to the "ADEA" case involving replacement. In Price v. Maryland Casualty Company, 561 F.2d 609 (5th Cir. 1977), the Fifth Circuit

articulated the elements of a prima facie "ADEA" case involving replacement: (1) That Plaintiff was a member of the protected age group; (2) That Plaintiff was discharged; (3) That Plaintiff was replaced by a person outside the protected age group; and (4) That Plaintiff was qualified to do the job. In the instant case, the Fifth Circuit articulates the elements of a prima facie "ADEA" case involving reduction in work force: (1) That Plaintiff was within the protected age group and has been adversely affected - discharged or demoted - by Defendant's employment decision; (2) That Plaintiff was qualified to assume another position at the time of discharge or demotion; and (3) That the employer

intended to discriminate in reaching the decision at issue. An examination of the two sets of requirements for prima facie cases reveals that element one of the instant case is equivalent to elements one and two of Price, supra, and that element two in the instant case and element four in Price, supra, are essentially equivalent. Price, supra, and the instant case treat the remaining necessary element quite differently. Price, supra, the replacement case, requires no showing of discriminatory intent, but a showing of simple replacement of the plaintiff by a person outside the protected age group. The instant case, on the other hand, requires a showing of discriminatory intent which is defined by the Fifth

Circuit as either (a) showing a conscious refusal to consider retaining or relocating a plaintiff because of his age, or (b) Defendant's regarding age as a negative factor in making the consideration as to retention or relocation. Thus if the reasoning of the Fifth Circuit is to remain the law, the "ADEA" plaintiff in the reduction case has a far greater burden than the "ADEA" plaintiff in the replacement case. The question naturally arises as to whether or not the third element of the reduction case can be replaced by some other element essentially equivalent to the third element of the replacement case so as to foster equal treatment of an "ADEA" plaintiff whether he is replaced or the victim of a reduction in

force. The third element in the reduction in force case should not mandate a showing of discriminatory content, but should be simply a requirement that the "ADEA" plaintiff show that he was not retained or relocated in a particular position kept by a person outside the protected age group after the reduction in force. This requirement, then, would be basically equivalent to the third element of Price, supra, and would without any question guarantee equal treatment to both categories of plaintiffs. Failure to remove the discriminatory intent element from the reduction in force case and replace it with the suggested element guarantees a violation of the Equal Protection Clause of the Fourteenth Amendment.

Even if the requirement imposed by the Circuit Court were held applicable to this "ADEA" action involving reduction in work force, testimony of each Plaintiff that younger employees were rotated into salaried positions the duties of which Plaintiffs could have done as adequately or better than those younger employees cannot simply be discarded by the Circuit Court. A reading of Page 11240 of the Circuit Court's decision at Note (6-8) indicates that the Circuit Court completely discarded these Plaintiffs' testimony. The Circuit Court stated: "Specifically, the evidence must lead the fact finder reasonably to conclude either (1) that Defendant consciously refused to consider retaining or relocating a plain-

tiff because of his age, or (2) Defendant regarded age as a negative factor in such consideration." The Circuit Court further states that this can be done by direct evidence such as finding what is tantamount to a written confession by the Defendant or by circumstancial evidence such as evidence of employer subterfuge. The Circuit Court adds a footnote 15: "Convincing evidence on this score, for example, would point to an employee-rotation plan that effectively shifted 'protected' workers into jobs likely to bear the burnt of a reduction in force. While Plaintiffs alleged this in the present case, the District Court we observe found their evidence unconvincing."

If the Circuit Court can discard

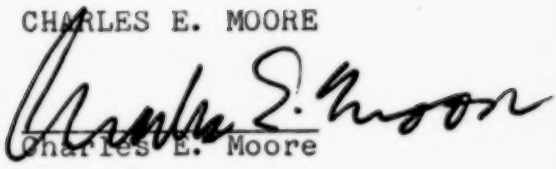
Plaintiffs' sworn testimony on the grounds that the District Court found the same unconvincing, although the jury found the same convincing, there is a denial of these Plaintiffs' right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted, the Supreme Court should reverse the Circuit Court and either remand the case for decision on the other issues which would have been decided if the Circuit Court had not ruled that the Plaintiffs failed to make out a prima facie case, or determine all the issues

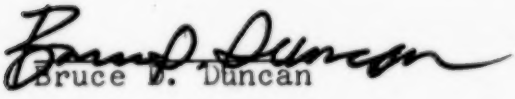
itself.

CHARLES E. MOORE



Charles E. Moore

BRUCE D. DUNCAN



Bruce D. Duncan

# APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

| | | |
|---|---|---|
| JAMES L. WILLIAMS, ET AL. | : | CIVIL ACTION |
| VERSUS | : | NO. C-75-1024-A |
| GENERAL MOTORS | : | |
| CORPORATION | : | |

O R D E R

This is an action for injunctive relief and damages resulting from a work reduction at the defendant's local automobile assembly plant. Presently pending is the plaintiffs' fifth motion to amend the complaint by adding Count Twenty, a claim for punitive damages and compensatory damages for pain and suffering, and Count Twenty-One, a pendent state cuase of action.

The case is brought under the Age Discrimination in Employment Act (hereinafter referred to as the "ADEA"), 29 U.S.C. §§621, et seq., which was enacted in 1967 to eliminate discrimination in employment because of age. Private civil actions to enforce the substantive prohibitions of the statute are authorized by 29 U.S.C. §626, which provides in part:

> (b) ... In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before

> instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged ....
>
> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter ....

29 U.S.C. §§626(b), (c). Since the ADEA is remedial legislation, it is to be liberally construed in order to effectuate its purpose. See Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975); cf. Blankenship v. Ralston Purina Co., 62 F.R.D. 35 (N.D. Ga. 1973).

As noted in the order of August 9, 1976, the ADEA is similar both in structure and purpose to Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§2-00e et seq., see Hudgson v. First Federal Savings and Loan Ass'n, 455 F.2d 818 (5th Cir. 1972), and analogies to this latter act are often helpful in framing the issues in an ADEA case. See Schultz v. Hickok Mfg. Co., 358 F.Supp. 1208 (N.D. Ga. 1973).

The two statutes are not co-extensive and differ dramatically in their remedies. Title VII authorizes only equitable relief, 42 U.S.C. §2000e-5(g), and the courts uniformly deny damage awards in actions brought thereunder. E.g., Jiron v. Sperry Rand Corp., 9 EPD §9990 (D. Utah 1975); Howard v. Lockheed-Georgia Co., 372 F.Supp. 854 (N.D. Ga. 1974); Guthrie v. Colonial Bakery Co., 6 EPD §8849 (N.D. Ga. 1972). The ADEA, however, provides both

equitable and legal remedies, 29 U.S.C. §626(b). To hold, as the defendant suggests, tha the identification of specific relief in 29 U.S.C. §626(b) by implication excludes all other remedies would not only eliminate the court's express jurisdiction to grant legal redress but also ignore the statutory qualification that the corrective measures are "without limitation."

In essence, the ADEA creates a statutory tort and the courts are empowered to utilize all appropriate legal and equitable resources. Rogers v. Exxon Research & Engineering Co., 404 F.Supp. 324 (D. N.J. 1975). On this basis, other courts in this district have approved claims for damages under the ADEA. Davis

v. Adams-Cates Co., Civ. No. C-76-47-A (N.D. Ga. June 30, 1976), and Dean v. American Security Ins. Co., Civ. No. C-76-237-A (N.D. Ga. June 30, 1976)(Judge Edenfield); Wilson v. American Motors Sales Corp., Civ. No. C-76-125-A (N.D. Ga. April 16, 1976)(Judge Hill): Murphy v. American Motors Sales Corp., Civ. No. C-76-136-A (N.D. Ga. April 7, 1976)(Judge Moye). As a result, a cause of action is stated for compensatory damages.

A separate problem is posed with respect to punitive damages. As a general rule, such damages are recoverable where there has been a willful and intentional disregard for the plaintiff's rights. See Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970). See also

Northwestern Nat'l Cas. Co. v. McNutty, 307 F.2d 423 (5th Cir. 1962). Moreover, punitive damages represent a common law tort remedy which would ordinarily be implied unless expressly precluded by statute. See Murphy v. American Motors Sales Corp., supra.

The defendant argues that the legislation evidences a congressional direction to exclude punitive damages. 29 U.S.C. §626(b) incorporates into the ADEA provisions of the Fair Labor Standards Act, 29 U.S.C. §§201, et seq. Section 216(b) of that act provides in part that:

> [a]ny employer who violates [this Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their overtime compensation, as the case may be, and in an

additional equal amount as liquidated damages.

The purpose of this supplementary remedy was to compensate the employee for damages exceeding his monetary loss. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945); Overnight Motor Trans. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). Under the ADEA, however, liquidated damages may be recovered only for willful statutory violations. 29 U.S.C. §626(b).

"Willful" in this context refers only to an intentional and knowing act. See Coleman v. Jiffy June Farms, 458 F.2d 1139 (5th Cir. 1971). A defense to such damages emerges if the defendant's actions,

though "willful", were undertaken in good faith and with reasonable belief that they did not constitute a statutory violation. 29 U.S.C. §§216(b), 260, 626(b). See Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976).

This construction, while arguably implying legislative intent to restrict the liability of an employer because of an unintentional violation of the statute, cannot be read to limit responsibility for conduct motivated by bad intent. Consequently, there is no prohibition against the recovery of punitive damages in the ADEA.

The plaintiffs also seek to add a pendent state claim based on the provisions of Ga. Code Ann. §105-1207.

> 105-1207. (4469) Procurer of wrong is joint wrongdoer. -- In all cases he who maliciously procures any injury to be done to another, whether it is an actionable wrong or breach of contract, is a joint wrongdoer, and may be sued either alone or jointly with the actor.

The proposed amendment alleges only that "[v]arious supervisors, officers, and other agents employed by the defendant have maliciously and without justification interferred [sic] with the right of the plaintiffs to be gainfully employed."

The plaintiffs have not demonstrated by argument or citation of authority that the conduct of the defendant's employees constituted an actionable wrong and thus no basis has been laid for derivative liability of the employer. Moreover, as a corporation, the defendant can only act

through its agents and employees and the cause of action proposed by the plaintiffs is merely a restatement of their other claims.

Accordingly, the motion to add Count Twenty is granted and denied as to Count Twenty-One.

So ordered this 16 day of September, 1976.

/s/ Albert J. Henderson, Jr.
Judge, United States District Court for the Northern District of Georgia

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

| | | |
|---|---|---|
| JAMES L. WILLIAMS, ET AL. | : | CIVIL ACTION |
| VERSUS | : | NO. C-75-1024-A |
| GENERAL MOTORS | : | |
| CORPORATION | : | |

JUDGMENT IN FAVOR OF GENERAL MOTORS AND AGAINST PLAINTIFF JACOB JOHNSON

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, upon GENERAL MOTORS CORPORATION's Motion for Directed Verdict. The issues having been duly considered and a decision having been duly rendered, it is ORDERED AND ADJUDGED that GENERAL

MOTORS CORPORATION's Motion for Directed Verdict with regard to plaintiff JACOB JOHNSON is granted, that plaintiff JACOB JOHNSON take nothing, that his action be dismissed, and that GENERAL MOTORS CORPORATION recover from plaintiff JACOB JOHNSON its costs with respect to his claim.

This 15 day of March, 1979.

/s/ Albert J. Henderson, Jr.

Albert J. Henderson, Jr.

Judge, United States

District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

| | |
|---|---|
| JAMES L. WILLIAMS, ET AL. | : CIVIL ACTION |
| VERSUS | : NO. C-75-1024-A |
| GENERAL MOTORS | : |
| CORPORATION | : |

JUDGMENT IN FAVOR OF GENERAL MOTORS AND AGAINST PLAINTIFF TOM COLLINS

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, upon GENERAL MOTORS CORPORATION's Motion for Directed Verdict. The issues having been duly considered and a decision having been duly rendered, it is ORDERED AND ADJUDGED that GENERAL

MOTORS CORPORATION's Motion for Directed Verdict with regard to plaintiff TOM COLLINS is granted, that plaintiff TOM COLLINS take nothing, that his action be dismissed, and that GENERAL MOTORS CORPORATION recover from plaintiff TOM COLLINS its costs with respect to his claim.

This 15 day of March, 1979.

/s/ Albert J. Henderson, Jr.
Albert J. Henderson, Jr.
Judge, United States
District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

| | | |
|---|---|---|
| JAMES L. WILLIAMS, ET AL. | : | CIVIL ACTION |
| VERSUS | : | NO. C-75-1024-A |
| GENERAL MOTORS | : | |
| CORPORATION | : | |

O R D E R

This is an action brought pursuant to the provisions of the Age Discrimination in Employment Act of 1967, as amended, (hereinafter referred to as the "Act"), 29 U.S.C. §§621 et seq. Jury verdicts were returned in favor of seventeen of the plaintiffs and the defendant now moves for a new trial or for judgment notwithstanding the verdict. Also pending is

the objection of the plaintiff, Thomas W. Collins, to the defendant's bill of costs.

As one of several general arguments, the dant contends that most of the plaintiffs failed to prove a prima facie case under the standards of Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977), because the evidence shows that fourteen of the plaintiffs were "replaced" by other employees over the age of forty. However, the court agrees with the reasoning of Moore v. Sears, Roebuck & Co., 464 F.Supp. 357 (N.D. Ga. 1979), and Polstorff v. Fletcher, 452 F.Supp. 17 (N.D. Ala. 1978), that there is no single method of proving a prima facie case of age discrimination just as there is no one, approved prima facie case of race

discrimination. See Furnco Construction Co. v. Waters, 98 S.Ct. 2943 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 n. 13 (1973). Since the age discrimination factors articulated in Price were borrowed from Title VII, see 561 F.2d at 612, the Supreme Court's recognition in McDonnell Douglas that the prima facie case may vary according to the circumstances should logically also be applied in the age context. Moore v. Sears, Roebuck & Co., supra, at 361-62; Polstorff v. Fletcher, supra, at 24. Indeed, the Fifth Circuit Court of Appeals noted in a recent age discrimination decision that "McDonnell Douglas does not establish an immutable definition of a prima facie case." Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977).

The present action demonstrates the weakness of assuming that an inference of discriminatory intent can be drawn only from the Price criteria. Many of the plaintiffs here were not "replaced" at all since they were demoted or laid off because of production cutbacks; their jobs were either eliminated or someone else who was "reduced" took their positions.

In addition, much of the thrust of the plaintiffs' cases was that the defendant undertook to protect its younger employees from the economic slump as much as possible while considering its older employees to be expendable. Since this alleged policy was effected by transferring younger employees to other salaried positions, the Price elements

make no sense. If, in fact, the defendant artfully "replaced" the plaintiffs with other employees who were over forty or were older than the incumbents in order to disguise the fact that younger employees were being protected by transfers it would defy congressional intent to nonetheless hold that, by such adroit shuffling of personnel, an employer can effectively discriminate against older employees and thus escape liability. See Moore v. Sears, Roebuck & Co., supra, at 363; Polstorff v. Fletcher, supra, at 24-25.

In a similar vein, the apparent holding in Price that the plaintiff must prove replacement by someone below the age of forty (as opposed to simply someone younger) should also be rejected.

Congress specifically prohibited discrimination in employment against any individual on the basis of age. 29 U.S.C. §623(a)(1). In addition, Congress restricted the Act's coverage to persons who were older than forty but less than sixty-five. Pub. L. No. 90-202, §12[1/] It does not necessarily follow that discimination in favor of a younger employee who is over forty constitutes compliance with the Act. Again, it would logically vitiate congressional purpose to permit an employer to consistently discharge sixty-four year old employees because of their age so long as they are replaced with

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1/ The act was amended in 1978 to expand these limits to include persons between the ages of 65 and 70. 29 U.S.C. §631(a).

forty-one year old workers. Employers whose bias against age happens to be limited to employees over sixty are thereby not exempted from the Act. Instead, whenever any individual suffers from an adverse employment impact resulting from age and he is within the limits of 29 U.S.C. §631(a), the discrimination is equally as real, the harm is just as great and the employer's attitude is likewise culpable regardless of the age of the replacement.[2/] See Moore v. Sears, Roebuck & Co., supra, at 364-66; Polstorff v. Fletcher, supra, at 24.

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2/ This is not to say that replacement by an older employee or one over forty would be irrelevant to the issue of discriminatory intent. However, the question is one for the jury.

In summary, the court adopts the Moore approach to the prima facie case problem:

> [T]he notion of a prima facie case in a discrimination action is a fluid one. Because the principle essentially embodies a rule of common sense, corresponding to the inferences that will ordinarily be drawn from a particular set of circumstances, we see no reason to hold that it can or must be expressed by a single formula. The prima facie case showing is that which, evaluated "in light of the common experience", Furnco, 98 S.Ct. at 2949, raises the inference that an employment decision was probably based upon an impermissible factor. That showing will necessarily vary from case to case. Indeed, an inference of discrimination requiring rebuttal by a defendant may be raised by a variety of methods under a single set of facts.

Moore v. Sears, Roebuck & Co., supra, at 362. While proof of the Price factors may

be sufficient to permit an inference of discriminatory intent it is not a necessary prerequisite.[3/]

Next, the defendant contends that the individual plaintiffs may not rely solely on proof of a "pattern or practice" of discrimination in order to recover. This conclusion is premised on the holding of LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), that class actions are not permissible under the Act. LaChapelle, based as it was on a interpretation of Section 16(b) of the Fair Labor Standards Act, as amended, 29 U.S.C. §216(b),

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3/ The defendant also asserts that failure to instruct a jury on the Price standards constituted error. For the reasons discussed above this argument too is rejected.

never reached the issue presented here nor does logic compel the defendant's expansion of that holding. To the extent the plaintiffs proved that during the cutback the defendant made its decisions based on a general policy of age discrimination, the jury could infer that each of the individual plaintiffs was subjected to this practice. See Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

Several of the plaintiffs testified that a number of higher executives at the two plants told them that recent college or GMI graduates and other newer employees were being retained during the reduction to prevent losing them. It was implied that older employees, such as the plaintiffs, would remain with the defen-

dant during this period because they had fewer employment alternatives. In addition, the plaintiffs introduced a letter of company policy indicating that newly hired college graduates should be protected as much as possible during the production cutback.

Finally, the defendant concedes that employees at both plants were given a "potential" rating in order to evaluate their performance. The plaintiffs' statistician testified that the potential rating tended to be lower among older employees.

From this evidence the jury could have determined an intent to discriminate against older employees. The defendant mounted a strong case in response. However,

much of the testimony by the statistician was rendered ambiguous by the fact that he never explained how his analysis classified employes who were transferred to hourly jobs (including fourteen of the seventeen prevailing plaintiffs) as opposed to those who were transferred to other salaried positions or were laid off entirely. See trial transcript (hereinafter referred to as "T".), Vol. 11 at 2759. This uncertainty muted the impact of his testimony as to the average age of employees who were "retained" or "laid off" and the average age of workers at both plants during the reduction. Since most of the plaintiffs actually worked during the entire production time it is difficult to tell where they fit into

these statements.

At any rate, the defendant demonstrates at most a close factual issue of intent based on circumstantial evidence and credibility determinations. Of course such a case compels neither a new trial nor a judgment notwithstanding the verdict.[4/]

The defendant also makes several specific contentions in support of its request for a new trial. Those concerning instructions to the jury are not

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4/ Along the same lines is the defendant's argument that the plaintiffs never proved they were "considered" for transfer jobs. The jury could have inferred that if this was true the reason of such lack of consideration was each plaintiff's age. If the defendant considered only younger employees for such jobs and exclused older ones because of their age, then, absent proof of a bona fide occupational qualification, the Act was violated.

persuasive. No charge on seniority systems was necessary because the jury was told that the defendant could make employment decisions in any way it chose so long as age was not a determining factor. As for consideration of "potential", the jury was instructed that the defendant could take an individual's qualifications into account when determining who to lay off or demote. Furthermore, the plaintiffs were entitled to argue that "potential" designation was a subterfuge.

The statements made by the plaintiffs' lawyers in opening and closing arguments, contrary to the defendant's assertions, were not so prejudicial as to require a new trial. Apparently, the defendant's

counsel agreed at the time since they did not object during the arguments and never moved for a mistrial. The defendant demonstrates no abuse of discretion or prejudice resulting from the order in which some of its witnesses were cross-examined.

The defendant raises several other issues in its motion for a judgment notwithstanding the verdict. The decision to submit to the jury the question of recovery of unemployment compensation will not be altered. Nothing in Marshall v. Goodyear Tire & Rubber Co., supra, at 736, indicates that a different method should be followed in a jury trial.

Similarly the jury properly considered the issue of liquidated damages. The

legislative history of the Age Discrimination in Employment Act Amendments of 1978, Pub.L. No. 95-256, §4(a), makes clear that liquidated damages is intended to be a legal issue and, thus, one for the jury. 3 [1978] U.S. Code Cong. & Ad. News 535 (House Conference Rep. No. 95-950, 95th Cong., 2d Sess.). The jury trial amendment became effective on April 6, 1978, and governed proceedings in the trial of this action, notwithstanding any special effective dates for some of the other amendments.[5/]

The defendant's contentions concerning he plaintiff, Bobby D. Murray, may have

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5/ E.g., Section 4(b)(2) which expressly refers to only the amendments in Section 4(b)(1) and not the jury trial amendment.

more merit. His 180-day notice, required under §7(d)(1), Pub.L. No. 90-202, was received by the Department of Labor on June 24, 1975. Plaintiffs' Exhibit 863. Therefore, Murray's recovery must be limited to acts of discrimination occurring on or after December 26, 1974. Thomas v. E.I. DuPont deNemours & Co., 574 F.2d 1324 (5th Cir. 1978). His employment record, Defendant's Exhibit 116, indicates that he was demoted from salaried positions on three occasions between that date and September 16, 1975, when he last returned to a salaried job. 10 T. at 2640.

Since the jury has already found liability, Murray may recover compensation lost as a result of the demotions between

December 26, 1974 and September 16, 1975.[6] The parties were previously able to stipulate the amount of pay to which he was entitled and actually received and presumably can do so with respect to the final period defined here.[7]

The final issue in the judgment n.o.v. motion relates to vacation pay. The specific question is whether the plaintiffs

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[6] Whether Murray was a "permanent" or "temporary" supervisor is of no moment if the jury found that he was adversely affected by an employment decision based on his age.

[7] This disposition requires alteration of only the amount of damages and not liability. Since a judgment n.o.v. would therefore be inappropriate the portion of the defendant's motion involving Murray will be construed as one for a new trial.

provided sufficient evidence that the amount they received as vacation pay (and so labeled in the stipulation filed on March 7, 1979) was previously earned and, therefore, represented money they would have been paid regardless of the demotion. If so, the calculation of damages should not include vacation pay in the amounts the plaintiffs received during the cutback. See Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), cert. den., 98 S.Ct. 2254 (1978); Laugensen v. Anaconda Co., supra, at 317-18.

There is a general consensus in employment law that employers have the burden of proving that income received after an unlawful termination or demotion mitigated the employee's damages. Rodriguez

v. Taylor, supra, at 1243; EEOC v. Kallir, Philips, Ross, Inc., 420 F.Supp. 919 (S.D. N.Y. 1976), aff'd mem., 559 F.2d 1203 (2nd Cir.), cert. den., 98 S. Ct. 395 (1977) (Title VII); see NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966) (labor relations); Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F.2d 1354 (9th Cir. 1975) (Title VII); Smith v. Concordia Parish School Board, 387 F.Supp. 887 (W.D. La. 1975) (school desegregation). The defendant here met that burden by way of the stipulation showing that during the cutback all but one of the recovering plaintiffs received an amount labeled vacation pay.

The plaintiffs' attempt to refute the apparent meaning of the stipulation in

inadequate. In response to the motion for a judgment n.o.v. they cite only Plaintiffs' Exhibit 1 as evidence to support their position. However, that document tends to contradict their argument since it states:

> In order to insure that an employe takes the vacation to which he is entitled, no salary payment shall be made in lieu of vacation. Vacations not taken during the current calendar year may not be carried over to the following year.

Id. at 22. The booklet also indicates that a salaried employee who is transferred to hourly status before July 1st (as was true of all of the recovering plaintiffs) is entitled to take his full vacation earned by his length of service "less any time off already taken under the paid absence allowance provisions ... while on the hourly roll." Id.

These policy statements imply that the plaintiffs received vacation pay only because they were on the hourly roll and would not have been titled to such pay if they had remained salaried. This conclusion is rendered somewhat dubious by the fact that, for several of the plaintiffs, the vacation pay was nearly as great as their regular pay and three of the plaintiffs who were laid-off completely during the cutback still received vacation pay even though apparently they did not work.

Nonetheless, the plaintiffs fail to point to any evidence in the record supporting their characterization of the vacation pay. They cannot dispute the stipulation simply by an unsupported hypothetical suggestion as to why they

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|---|---|
| George | No change |
| Houston | No change |
| Kyle | No change |
| Williams | 939.70 |

Collins objects to both items sought to be taxed against him as costs. The court previously rejected the distinction between so-called "discovery" depositions and those necessarily obtained for use in the case. Perini Corp. v. First National Bank of Habersham County, Georgia, No. 17024 (N.D. Ga. Oct. 26, 1977). Collins does not otherwise challenge the assertion by the defendant's counsel that his deposition met the test set forth in United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963). The defendant makes no attempt to justify the costs of any other depositions

sought to be taxed against Collins and, therefore, such costs will be disallowed as there is no basis on which to make the finding of necessity required by Kolesar.

The court is not persuaded that the daily transcript of the testimony of the witnesses at trial was necessary in defending this action. See Wahl v. Carrier Manufacturing Co., 511 F.2d 209 (7th Cir. 1975); Galella v. Onassis, 487 F.2d 986 (2nd Cir. 1973). The remaining issues are attorneys' fees and injunctive relief. As for the latter, the jury's decision on the merits is controlling with regard to the seventeen plaintiffs who obtained

favorable verdicts.[8/] Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Swofford v. B & W, Inc., 336 F.2d 405 (5th Cir. 1964), cert. den., 379 U.S. 962 (1965); 9 Wright & Miller, Federal Practice & Procedure, §2338. The other three elements of injunctive relief may be considered at a hearing to be scheduled for that purpose. Attorneys' fees will be determined after disposition of the equitable issues.

Accordingly, consideration of the motion for a new trial respecting Murray is deferred. The parties are directed to

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8/ A determination on the merits is still open as to Johnson and Collins since verdicts were directed against them solely on the ground of their failure to prove damages.

meet and attempt to stipulate his lost earnings in accordance with this order. The clerk is directed to resubmit the motion fifteen (15) days after the filing of this order. The motion for a judgment notwithstanding the verdict is granted against all of the plaintiffs who recovered at the trial except George and the judgments are to be modified as set forth above. The costs taxed against Collins are to be limited to $175.35. Except as specifically stated here the motions are denied in all other respects. The parties are directed to appear at Room 522, United States Courthouse, Atlanta, Georgia, on the 11th day of July, 1979, at 9:30 o'clock a.m. for the purpose of determining whether a permanent injunction

should be entered against the defendant.

So ordered this the 4 day of June, 1979.

/s/ Albert J. Henderson

Judge, United States District Court for the Northern District of Georgia

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

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| JAMES L. WILLIAMS, ET AL. | : | CIVIL ACTION |
| VERSUS | : | NO. C-75-1024-A |
| GENERAL MOTORS | : | |
| CORPORATION | : | |

O R D E R

This is an action brought pursuant to the provisions of the Age Discrimination in Employment Act (hereinafter referred to as the "ADEA"), 29 U.S.C. §§621 et seq. The plaintiffs were employed in supervisory capacities by the defendant, General Motors Corporation (hereinafter referred to as "General Motors") during 1974 and 1975. During this time their

employment was modified when defendant reduced the work force at its Doraville and Lakewood plants. After a jury trial, judgments were entered for several of the plaintiffs. Subsequently, some of these judgments were amended and judgments notwithstanding the verdicts were granted in favor of the defendant.

Presently pending is the application of the plaintiffs for equitable relief. Although the court concludes that an injunction should not issue, the novelty of some of the plaintiffs' suggestions, and the fact that the court's decretion is not without limits, makes a brief exposition of the relevant law, and its application in this case, appropriate.

The ADEA provides that "[a]ny person

aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of" the Act. 29 U.S.C. §626(c). While this section of the ADEA makes it clear that the court, in its discretion, may issue an injunction, see Lorillard v. Pons, ____ U.S. ____, 98 S.Ct. 866 (1978), it does not require the grant of injunctive relief, nor alter the standards by which the propriety of such a remedy should be measured. Cf. Hecht Co. v. Bowles, 321 U.S. 321 (1944); see generally, 11 Wright & Miller, Federal Practice and Procedure: Civil §2942 (1973).

The plaintiffs assume the burden of showing that an injunction is warranted, and the court will not create arguments

when the plaintiffs have failed.[1/] United States v. W. T. Grant Co., 345 U.S. 629 (1953). This rule is particularly meaningful here, where the transcript of the trial is over three thousand pages. At the hearing on the plaintiffs' prayer for injunctive relief the parties were directed to make specific references to the transcript in their briefs, and to submit proposed orders. The rules of this court provide that all motions shall be accompanied by legal briefs. Rule 91.1, Local Rules of the Northern District of Georgia. Hence, the court proceeds on the premise that the

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1/ This action was brought by the plaintiffs in their personal capacities, not as representatives of a class.

parties, who are represented by able counsel, have advanced their best reasons and cited all relevant testimony.

The factual conclusions of the jury in the trial of the action for damages are binding on the court. Parklane Hosiery Co. v. Shore, ___ U.S. ____, 99 S.Ct. 645 (1979); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Any issue of fact which was necessarily determined by the jury is not open for reconsideration, but has been conclusively determined. Ashe v. Swenson, 397 U.S. 436 (1970); Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972). Unfortunately, this case was concluded with a general verdict and it is impossible to determine which of the defendant's employment policies, if any,

were found to be disciminatory. In reaching its verdict, the jury could have found that the plaintiffs were discriminated against individually and in an ad hoc manner, and not as a result of employment practices directed at all persons over forty years old. Moreover, much of the attention must be focused on several legal issues. Hence, the court cannot pretermit a consideration of the particular policies which the plaintiffs find invidious merely because some of the plaintiffs were successful in their jury trial.

The proposed order submitted by the plaintiffs would enjoin General Motors from all violations of the ADEA, without limitation to the plants or persons

involved in this case. They do not cite any authority for such a broad injunction, nor even address this issue. There is a serious doubt about the propriety of issuing an injunction of a scope far broader than the alleged wrongdoing.[2/] Cf. Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

Even if this case involved a showing of nationwide or company wide discrimination, the court still would be reluctant to grant such extensive relief without the

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2/ The evidence in this case only concerns two of defendant's plants, although it is, of course, possible that General Motors follows similar policies at its other plants. At the hearing on the injunction, the plaintiffs were quite successful in showing that the evidence adduced at the trial related only to these plants.

intervention of the Secretary of Labor. The Secretary has authority to enforce the ADEA, 29 U.S.C. §626(b), and, in fact, all private rights of action terminate upon his instituting a suit, 29 U.S.C. §626(c). Since the Congress apparently felt that the Secretary should have the power to preempt private action, and chose to limit his authority to file suit in the first place, the court should not effectively destroy that power, at least not where the plaintiffs fail to defend, or even discuss, that result.

Also, it should be noted that all of the nationwide injunctions cited were initiated by the Secretary of Labor, and a further examination does not reveal any exception to this rule. The Secretary

cannot bring an action until he has attempted "to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. §626(b). An injunction is not the proper remedy where these measures have not been pursued.

The threshold issue in a suit for equitable relief is whether available legal remedies are inadequate. The plaintiffs have not shown that such remedies are inadequate.

The plaintiffs maintained that any future aggrieved employees should be spared the expense of legal proceedings,

and permitted to litigate dismissals in contempt proceedings, because damage suits are time consuming. But they do not demonstate how this sort of inadequacy could be rectified by equitable relief. Furthermore, the court is not satisfied that converting all enforcement actions into contempt proceedings, with the more serious penalties commensurate therewith, will accelerate the vidication of wrongs. Even the plaintiffs concede that in any prosecution for contempt of court General Motors would still have the right to raise the defenses it would have in a legal proceeding brought under the ADEA. Plaintiffs' Memorandum in Support of Their Prayer for Injunctive Relief, at 7-8. See

Mitchell v. Pidcock, 299 F.2d 281 (5th Cir. 1962).

The purpose of injunctive relief is not to remedy past wrongs, Marshall v. Goodyear Tire & Rubber Co., supra; Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), but to prevent future violations. United States v. W. T. Grant Co., supra. As already observed, the plaintiffs must carry the burden of proving the probability of future violations. They have not met that burden.

During the jury trial evidence of the defendant's present policies, as opposed to those at the time of the demotions, was excluded as irrelevant. Transcript at 35-36. At the injunction hearing the

plaintiffs did not tender any evidence concerning current policies, and the court cannot speculate as to their effect. The policies, then, must be examined on the basis of the evidence adduced at the trial and the defendant must prevail where the plaintiffs did not incidentally show that the policies are still in effect.

The plaintiffs challenge several of the defendant's personnel procedures, alleging that, as applied, they resulted in the invalid demotion of the plaintiffs during the production curtailment. They attack (1) the use of "potential ratings"; (2) employee transfer policies; and (3) preferential treatment of recent graduates of technical colleges. In the con-

sideration of these practices, it bears emphasis that the plaintiffs do not justify their proposed injunction even if these policies are improper. Specifically, the plaintiffs fail to show that legal remedies are inadequate, that the suspect procedures are still in effect, or that such an expansive injunction would be appropriate in any case.

The use of potential ratings is criticized because they (the ratings) tend to fall as the age of employees rise. The plaintiffs simply rely, at least at this stage of the proceedings, entirely on their statistical analysis and the fact that the ratings were available to those responsible for personnel decisions. In view of this focus, it is significant that

there was no relationship between potential ratings and demotion. Transcript at 2258 and 2714. Assuming for the moment that a statistical correlation could support an injunction, the absence of a connection between the ratings and terminations is fatal where the plaintiffs neglect to point out infirmities in the policy itself.

General Motors transferred some of its employees from one department to another in order to protect them from the reduction in work force. The plaintiffs question these factors which determined the tranfers. The defendant responds that the purpose of the transfers was to insure that valuable employees were not lost permanently because of the temporary layoff.

The ADEA does not require that young people be terminated before older persons, but only that employees not be discharged because of their age. 29 U.S.C. §623(a). A termination "based on reasonable factors other than age" is not unlawful. 29 U.S.C. §623(f)(1). The court is satisifed with the defendant's explanation of its transfer policy. The fact that most of the transferees were young along does not justify an injunction.

The plaintiffs finally urge that General Motors continued to hire recent graduates while laying off older workers. In support of this argument, the plaintiffs introduced two letters written by one of defendant's vice presidents, who was responsible for staff development and

personnel matters. The first of these letters (the "Fuller letters") directed managers to honor all employment offers to recent college graduates and to continue selective recruiting of graduates. The second letter states, in part, "[i]f possible, they [recent graduates] should not be affected by layoff during the first year of employment so that sufficient opportunity is provided to evaluate their future potential to the organiziation."

Whether this policy violates the ADEA[3/] need not be decided at this time. At the

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3/ The Fourth Circuit discussed employment agency advertising directed at "recent college graduates." Hodgson v. Approved Personnel Service, 59 F.2d 760 (1975). Congress may have intended to allow employers to set age requirements for management training programs. See H. R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in part in [1967] U.S. Cong. Code & Ad. News, 2213, 2217

injunction hearing the defendant introduced the 1977 edition of its Working With General Motors handbook, which provides that reductions in force will be made in order of last seniority. The plaintiffs chose not to offer evidence at the hearing, nor were they successful in discrediting the effect of the new policy during a spirited cross-examination of the personnel director of the defendant's Doraville assembly plant. The court cannot conclude that the policy enumerated in the Fuller letter is still in force, given the plaintiffs' failure to introduce any

evidence in support of the proposition.[4/]

The court cannot agree with the plaintiffs' assertion that their proposed injunction would involve only "minimal inconveniences" to General Motors. Plaintiffs' Memorandum at 8. See e.g., Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1979) (overtime pay); Mitchell v. Pidcock, supra (minimum wage); Hodgson v. Corning Glass Works, 474 F.2d 226,236 (2nd Cir. 1973) (equal pay). To the contrary, it would place a tremendous burden on the defendant. The employer would be required

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4/ The plaintiffs refer to the testimony of the general supervisor of the Doraville plant to demonstrate that the Fuller letters reflect present policy. This testimony is inclusive, especially in light of the injunction hearing evidence.

to significantly modify its employer-evaluation procedures, and establish elaborate mechanisms to insure compliance with the ADEA. All of the defendant's employment decisions would be made under the cloud of possible contempt, even if the policies of the ADEA were implicated only minimally. These problems, together with the difficulty facing the court in supervising the day-to-day decisions of such a large employer, preponderate against such an extensive injunction.

The ADEA provides that the replacement of one employee by another is not unlawful when it is based on reasonable factors other than age. 29 U.S.C. §623(f)(1). The disjunctive language of this section makes it clear that it is only necessary

that the basis be reasonable, and, so long as it is not a subterfuge, the employer need not show that the replacement is absolutely necessary to insure that its business can continue to function adequately.

Paragraphs fourteen (14) and fifteen (15) of the proposed injunction would forbid General Motors from replacing older employees with younger ones with superior educational background unless the education was necessary to adequately perform the job. Paragraphs sixteen (16) and seventeen (17) prohibit replacements where the junior employee has superior skills unless they are necessary skills. The plaintiffs do not contend that such replacements are themselves illegal. Consequently,

the defendant should not be precluded from effectually improving its work force. Accordingly, the plaintiffs' prayer for injunctive relief is denied. The remaining issue of attorneys fees for the plaintiffs is set for hearing on the 4th day of October, 1979 at 10:00 o'clock A.M. in Room 522, United States Courthouse, Atlanta, Georgia. The parties should submit briefs and/or itemizations at least ten days prior to that date.

So ordered this 5 day of September, 1979.

/s/ Albert J. Henderson
United States Circuit Court
Judge sitting as District
Court Judge by designation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

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| JAMES L. WILLIAMS, ET AL. | : CIVIL ACTION |
| VERSUS | : NO. C-75-1024-A |
| GENERAL MOTORS | : |
| CORPORATION | : |

ORDER

Twenty individual employees brought the above-styled action against General Motors Corporation alleging violations of the Age Discrimination in Employment Act, 29 U.S.C.A. §§621-634. The successful plaintiffs now seek an award of attorneys' fees, pursuant to the provisions of 29 U.S.C.A. §626(b), which incorporates the

remedies provided in 29 U.S.C.A. §216(b) (1979 Supp.).

The plaintiffs commenced this action by filing a complaint alleging discrimination because of their age. The complaint was repeatedly amended, and at various times the plaintiffs sought a temporary restraining order, which was denied; a preliminary injunction, the request for which was eventually withdrawn; damages totalling $6,500,000.00, discussed below; and a permanent, nation-wide injunction against any violation of the Act, which was denied.

Three plaintiffs were dismissed at the end of the plaintiffs' case-in-chief, and the court entered judgments n.o.v. in favor of General Motors and against ten

plaintiffs. The seven remaining plaintiffs recovered a total of $36,674.61.

The plaintiffs' counsel were retained under a contract providing for a fee equal to the greater of forty percent of all amounts recovered by their clients, which amounts to $14,669.85, or such amount as this court might award as a reasonable fee.

The plaintiffs now seek fees of $126,640.00, all of which, pursuant to the fee agreement, would go to their lawyers. In support of this request plaintiffs submitted a brief, consisting primarily of a discussion of the guidelines provided in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and what they refer to as an "Itemized Bill." The

bill contains approximately two hundred fifty entries, each entry consisting of a brief statement of the "service performed," the number of hours claimed, the date the work was done and the initials of the attorney who performed the work. A compilation of paralegal time is appended.

General Motors opposes the motion on several grounds: (1) the original motion did not even attempt to allocate time between work performed for successful and unsuccessful plaintifss; (2) compensation is sought for unnecessary services, such as tasks performed by two lawyers when one would have sufficed, or clerical work unnecessarily completed by lawyers; (3) compensation for paralegal work was charged at the rate of $15.00 per hour,

when many of these duties were secretarial in nature and did not require any legal training and, in any case, the paralegals had been paid much less; (4) the proposed hourly rates were excessive; and (5) the time records kept by counsel for plaintiffs were inadequate.

The parties agree that this matter is governed by the decision in Johnson. One consideration in setting a reasonable fee award is "[w]hether the [contractual] fee is fixed or contingent." 488 F.2d at 718. As mentioned above, the plaintiffs agreed to pay their counsel the greater of forty percent of the recovery or the court-awarded fee.

Johnson provides that "[i]n no event ... should the litigant be awarded a fee

greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." 488 F.2d at 718. This guideline may have been designed to insure that prevailing plaintiffs did not receive excess compensation, in the form of attorneys' fees not passed on to counsel, but it also reflects the fact that "[t]he fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorneys' fees expectation when he accepted the case." Id. The contractual fee, as noted above, is $14,669.85. That this fee is appropriate is buttressed by the fact that, as reviewed below, it is virtually the same fee that would be awarded had there been no fee contract.

Johnson points out that Congress did not give the courts "a mandate ... to make the prevailing counsel rich." 488 F2d 714, 719. Just as in Title VII cases, in provided for the award of attorneys' fees in age discrimination suits Congress acted "not for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of [the] litigation." Id. Counsel's emphasis on the alternate clause of their fee contract cannot disguise the fact that no rational group of plaintiffs, however wealthy, would have agreed to pay more than forty percent of the recovery in this action. This conclusion is underscored by

the fact that under the contract only the defendant, and never the plaintiffs, would be required to pay amounts in excess of forty percent of the recovery, and the fact that if the court found reasonable fees to be less than the contingent fee, counsel would still be entitled to their forty percent (plaintiffs asked for damages of $6,500,000.00).

It is worth mentioning that plaintiffs' lawyers told the jury, in arguing for punitive damages, that a verdict limited to lost pay would not even cover the costs of the litigation. Unfortunately for the plaintiffs, this argument met with only limited success.

The court is well aware that the amount to be awarded as attorneys' fees is

not "limited to the amount of the plaintiffs' pecuniary recovery." Harkless v. Sweeny Indep. School District, No. 79-1800, slip op. at 1824, 1828 (5th Cir. December 19, 1979). However, the only relief counsel obtained for the plaintiffs was the $36,674.16 in damages. There was no award of punitive damages, nor did plaintiffs obtain any equitable relief. Plaintiffs' attorneys cannot even take credit for securing reemployment for the plaintiffs. In short, the plaintiffs have been unable to convince the court it is reasonable to award attorneys more than $125,000.00 for recovering less than $40,000.00 for their clients.

As stated earlier, a similar award would be appropriate under the Johnson

guidelines if there were no contingency-fee contract. Several of the factors in Johnson that would preponderate in favor of a larger fee award are not present in this case. At the attorneys' fee hearing plaintiffs' counsel admitted that they were not precluded from taking work for other clients who would have paid more, and they never suggested that this litigation created any conflicts of interest. This case did not proceed under any time constraints, nor had there been any prior professional relationship between the plaintiffs and their lawyers. Counsel are not entitled to any premium because the case could be classified as undesireable - if anything their participation will help their practice. They have been unable to

cite any cases in which such large awards have been made where the results have been so minimally beneficial to the plaintiffs.

It is true that certain novel legal questions arose before and during the trial, particularly the issues of the availability of a jury trial and whether a prima facie case was established where the plaintiffs were not replaced by younger people but were laid-off before junior employees. However, these questions were raised by the defendants, and the briefs submitted by the plaintiffs were of little use in resolving them. The attorneys also argue that they were required to research novel issues concerning appropriate remedies, but they were denied most of the relief they requested, and in some

instances, such as on the issue of a permanent injunction, their exposition of law was patently inadequate.

The parties agree that the hours spent on preparation of the case, and reasonableness of the expenditures, are the most important factors in the computation of the fee. There is a substantial dispute as to the amount of time plaintiffs' counsel devoted to the case. At the fee hearing they sought to introduce an "Itemized Bill" to show how much time they spent on preparation for the trial. They generally work for a contingency fee, and this is one of the few cases in which any they kept any time records. They testified that during the course of the litigation they kept

handwritten notes of the time they devoted to the case. In January, 1979, this information was entered into the memory of a word processing typewriter, and the original memoranda were destroyed. The Itemized Bill was prepared from the stored information, as supplemented after January, 1979.

General Motors persuasively argues that the profferd bil is excludable hearsay, not falling within any of the exceptions provided in the Federal Rules of Evidence. For lack of better evidence, though, the bill will serve as a starting point for the reconstruction of time reasonably expended. In view of the manner in which the bill was presented, however, the defendant may justifiably

insist that the particulars be closely examined. Counsel for the plaintiffs testified at length at the attorneys' fee hearing, and the court has no doubt that they in fact spent these hours on preparation of the case. Whether it was necessary to use all this time to properly present this case is another matter entirely.

The plaintiffs' case was inefficiently presented. For example, the plaintiffs filed seven amendments to their complaint. Recovery is sought for time spent by two attorneys when one would have been sufficient, such as at depositions and during trial preparation. Numerous hours were consumed supervising paralegals copying documents obtained from the

defendant. The plaintiffs request compensation for over two hundred hours spent "outlining" depositions that took less than one-hundred hours to conduct.

Similarly, as they admit in their Supplementary Brief, counsel may not recover fees for services that did not produce favorable results. In their supplemental brief they concede that they should not recover for the time they spent on briefing their request for a permanent injunction, or for time use in advocating other denied relief, such as the temporary restraining order.

Finally, and most important, the plaintiffs' counsel are not entitled to compensation for time spent preparing the cases of those plaintiffs who were denied

relief. In the supplemental brief they suggest that only twelve of the over eighteen hundred hours claimed were spent exclusively on the claims of the thirteen plaintiffs whose claims were eventually dismissed. It is, of course, true that much of the work would have been necessary had there been only one plaintiff, but it is difficult to accept the statement that all but twelve hours were so required. The description of services contained in the bill is too abbreviated to allow the court to make an indepenent examination, and, even if their time records are inadequate, the plaintiffs have failed to carry their burden of proof that all time expended was necessary for the prosecution of the successful claims. Johnson, 488

F.2d 714, 720. At least one court has held that "[i]n the absence of records or data which would enable the Court to allocate lawyer's time to particular claims or plaintiffs, a simple arithmetic proration of the time expended appears reasonable. 1/ Chapman v. Pacific Telephone & Telegraph Co., 456 F.Supp. 77, 80 (N.D. Cal. 1978).

There is also a dispute over the plaintiff's request for compensation for the work of paralegals. They request $15.00 per hour for 852 hours of paralegal time. At the attorneys' fees hearing it became apparent that a good part of this paralegal effort was spent in non-compensable

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1/ The plaintiffs in Chapman agreed to this approach.

secretarial work, by the plaintiffs fail to separate these secretarial services. Second, there is double counting of the hours of one paralegal for one week (Jan Covington for February 13-20, 1979). The plaintiffs have not corrected these entries, leaving the court to interpret this as a claim for compensation for twenty or more hours a day for a week. Finally, the plaintiffs' contention that they be compensated for paralegal time at fifteen dollars an hour must be rejected. They also seek remuneration for attorney time spent supervising paralegals, and any recovery for paralegal, as opposed to secretarial, work would be limited to the wages paid, which were approximately one-fifth of the requested rate. Lamphers v.

Brown University, 48 U.S.L.W. 2417 (1st Cir. Dec. 6, 1979) (Title VII); Chapman v. Pacific Telephone & Telegraph Co., 456 F.Supp. (N.D. Cal. 1978).

In conclusion, the plaintiffs fail to carry their burden of proving the time devoted to the successful plaintiffs, nor have they shown what part of that work was necessary to the effective presentation of those claims. It is impossible, given the incomplete information the plaintiffs have made available, for the court to arrive at satisfactory answers to these two questions. However, as can be seen from an examination of the computations contained in General Motors' Proposed Findings, the $14,669.85 award is substantially similar to what would be awarded if

we compensated Charles Moore at $60.00 per hour, Bruce Duncan at $55.00 per hour and the other plaintiffs' attorneys at $45.00 per hour, which rates are found to be reasonable. Cf. Berry v. Board of Regents, No. C76-1361-A (N.D. Ga. Oct. 3, 1978), (Moore and Duncan each awarded $50.00 per hour).

Therefore, the plaintiffs are entitled to an attorneys' fees award in the amount of $14,669.85.

Let judgment issue accordingly.

So ordered this the 8 day of February, 1980.

/s/ Albert J. Henderson
United States Circuit Court Judge sitting as United States District Judge, by designation

James L. WILLIAMS, Jr., L. C. Allen, Roy B. Davison, Jacob C. Johnson, William W. Landers, William N. Bailey, Ralph Dodd, William J. Bales, et al., Plaintiffs-Appellants, Cross-Appellees.

v.

GENERAL MOTORS CORPORATION, Defendant-Appellee, Cross-Appellant.

Nos. 79-2857, 80-7192.

United States Court of Appeals, Fifth Circuit.

Unit B

Sept. 14, 1981.

Age discrimination action was brought. The United States District Court for the

Northern District of Georgia, Albert J. Henderson, Jr., J., entered judgment, and appeals were taken. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) plaintiffs could have established prima facie case by showing that plaintiffs were within protected age group and that they had been adversely affected by defendant's employment decision by showing that they were qualified to assume another position at time of discharge or demotion, and by producing evidence, circumstantial or direct, from which fact finder might reasonably have concluded that employer intended to discriminate in reaching decision at issue, and (2) record established that age discrimination plaintiffs failed

to establish prima facie case in action concerning employer's reduction-in-force.

Reversed.

1. Federal Courts 666

Neither dismissal of first age discrimination plaintiff's appeal from directed verdict, nor first and second plaintiffs' failure to join in notice of appeal filed following entry of partial judgments n.o.v. on successful claims of other plaintiffs, precluded Court of Appeals from considering claims made by such plaintiffs on appeal, even though notice of appeal all plaintiffs executed following entry of final judgment was docketed separately from appeal taken from partial judgments

n.o.v. on plaintiffs' claims. Fed. Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.; F.R.A.P. Rules 3(a, c), 4(a), 12(a), 28 U.S.C.A.

2. Civil Rights 44(6)

In order to establish prima facie case, age discrimination plaintiffs were not required to demonstrate that employer, during course of reduction-in-force, actually replaced each plaintiff with individual outside age group protected under statute. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. §621(b).

3. Civil Rights 44(6)

In action for alleged age discrimination resulting from reduction-in-force,

plaintiffs could have established prima facie case by showing that plaintiffs were within protected age group and that they had been adversely affected by defendant's employment decision, by showing that they were qualified to assume another position at time of discharge or demotion, and by producing evidence, circumstantial or direct, from which fact finder might reasonably have concluded that employer intended to discriminate in reaching decision at issue. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. §621(b).

4. Civil Rights 9.15

The Age Discrimination in Employment Act mandates that employer reach employ-

ment decisions without regard to age, but it does not place affirmative duty upon employer to accord special treatment to members of protected age group. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. §621(b).

5. Civil Rights 44(6)

In order for age discrimination plaintiff to establish that employer intended to discriminate in reaching employment decision during course of reduction-in-force, as required for plaintiff to establish prima facie case, plaintiff's evidence must lead fact finder reasonably to conclude either that defendant consciously refused to consider retaining or relocating plaintiff because of his age

or that defendant regarded age as negative factor in such consideration. Age Discrimination in Employment Act of 1967, § 2(b) as amended 20 U.S.C.A. § 621(b).

6. Civil Rights 9.15

Bare fact that employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination; only when such recruits are insulated from reduction-in-force at expense of employees within protected age group as Age Discrimination in Employment Act implicated. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. § 621(b).

7. Civil Rights 9.15

The Age Discrimination in Employment

Act targets discrimination against employees who fall within protected age category, not employees who have attained given seniority status. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. §621(b).

8. Civil Rights 44(6)

Record established that age discrimination plaintiffs failed to establish prima facie in action concerning employer's reduction-in-force. Age Discrimination in Employment Act of 1967, § 2(b) as amended 29 U.S.C.A. § 621(b).

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Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, and HILL, Circuit Judge, and SHOOB,* District Judge.

JAMES C. HILL, Circuit Judge:

In this case, we explore the contours of the Age Discrimination in Employment Act (ADEA), 29 U.S.C., §§ 621-634 (1976 & U.S.C.A. Cum. Supp. 1980), and resolve questions concerning the intended scope of that Act. Our conclusion, in brief, is that plaintiffs have failed to establish a prima facie case of age discrimination, and we accordingly affirm certain orders of the district court and reverse others, as detailed infra.

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*District Judge of the Northern District of Georgia, sitting by designation.

The trial of this cause was tortuously complex; the many thousands of pages of trial testimony, depositions, and exhibits bear witness to that. The record reveals a most patient and thorough trial judge whose detailed inquires and reasoned orders at all stages of this cause have facilitated greatly our own decisional process. To the facts and factors of that process, we now direct our attention.

## I. BACKGROUND

### A. Factual Overview and Procedural History

In January 1975, plaintiffs[1] were employed by the General Motors Corporation (GM) in salaried, supervisory positions at two Atlanta-area plants, one located on Lakewood Avenue in the city, the other located in Doraville, Georgia. At about this time GM-in an effort to cope with the

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[1] James L. Williams, Jr., L. C. Allen, William N. Bailey, William J. Bales, James G. Boles, Thomas Collins, Roy Davison, Ralph Dodd, Harold E. George, Sr., C. J. Harper, Wallace R. Houston, Jacob Johnson, Franklin D. Kyle, William W. Landers, Horace W. McGinnis, Walter B. Mitchell, William P. Roberson, Herschel Vaughn, and Bobby Murray are plaintiffs-appellants, as well as cross-appellees in Nos. 79-2857 and 80-7192. Throughout they are collectively referred to as "plaintiffs."

deepening economic recession-introduced at both plants a series of "personal adjustments" which affected all plaintiffs and precipitated this lawsuit. The "adjustments," which entailed elimination of one of two shifts in operation at each plant, left three plaintiffs[2] jobless and relegated the others to hourly wage employee status.[3] The effect of this action on

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[2] Williams, Allen, and Davison.

[3] No plaintiff was actually "replaced" by another employee at the time of the reduction. Rather, the sole remaining shift was reconstituted and, in fact, drew its staff from both pre-reduction shifts. It is noteworthy and undisputed that the positions held by 15 of the 19 plaintiffs were staffed during reduction by employees aged 40-65 and thus "protected" by the ADEA as it read at that time. Moreover, four of those 15 positions on the reconstituted shift were filled by GM employees older than the plaintiffs who had occupied such positions on one of the two pre-reduction shifts.

the size of the salaried supervisory staff at the two plants was profound: personnel was cut approximately 50 percent; a total of 397 salaried employees were either reduced to hourly wage status or laid off.

On May 30, 1975, fifteen of the plaintiffs in this case filed a voluminous complaint charging unlawful age discrimination by defendant General Motors, seeking damages, attorneys' fees, back pay, and injunctive relief. The complaint, which was subsequently amended to embrace four additional party-plaintiffs, was brought under the Age Discrimination in Employment Act of 1967, 20 U.S.C. §§ 621-634 (1976), and was grounded jurisdictionally upon 29 U.S.C. § 633a(c) (1976).

The operative allegations of plaintiffs' complaint, which appeared in paragraphs 11, 12, and 13 of each of the courts, charged:

11.

The action taken by defendant in altering plaintiff's job position was based upon said employee's age.

12.

The mentioned change in plaintiff's job position from a salaried position was made by defendant, while defendant retained employees younger than plaintiff and with less seniority than plaintiff in salaried positions which plaintiff was capable of fulfilling as adequately as, if not better than, said retained younger employees.

> The above mentioned activity of defendant in changing plaintiff's job position was part of a general scheme of defendant to either lay off or demote from salaried positions to hourly wage positions employees of defendant whose age was forty (40) years or greater but less than sixty-five (65) years.

Plaintiffs' Complaints, Record, Vol. I, at 3091, 3094. A jury trial of plaintiffs' legal claims commenced on February 22, 1979, and lasted three weeks. At the very outset, plaintiffs called six GM "managing agents" to testify, on cross-examination, as to certain of defendant's internal

procedures. The district court denied GM's request to question these witnesses at that time since GM would later, in presenting its own case, have opportunity to call its own agents to testify.

Plaintiffs' theory, propounded at trial, is that GM embraced two discriminatory policies in effecting its job reductions. The first of these was GM's secret computerized rating systems maintained for salaried employees. The ratings stored on this sytem were not available to a subject employee and differed from the official personnel ratings also kept on an employee. The numerical composite rating score crucial to this system reflected three factors: potential, or long-range

ability to advance; promotability, or the immediacy with which an employee could advance; and, job performance, or ability to perform assigned duties. Plaintiffs' statistical expert, Frank Millard, testified that he examined relevant rating figures for the two GM plants in question, constructed an age classification statistical system consisting of nine intervals covering employee ages 21 to 63, determined a mean age for each classification, and undertook regression and Chi-square analyses to determine the relationship,if any, between age and one of the three rating factors, "potential." The expert's conclusion was "that as a

person's age increased their [sic] potential rating became worse." Record, No. 79-2857, Vol. XV, at 2230. On cross-examination, however, plaintiffs' expert's testimony was subjected to careful scrutiny. Millard first admitted that, in the personnel actions under investigation, an older GM employee had a greater likelihood of retention during the reduction than a younger employee. He then acknowledged that he found no relationship between an employee's "potential" rating and how that employee fared during the reduction. Finally, GM's counsel asked plaintiffs' expert to address the other two factors in the composite personnel score, "job performance" and "promotability."

Q. . . . [Y]ou made a study of that, didn't you?

A. Yes.

Q. And you determined from that study that there was no correlation between someone's promotability rating and his age, did you not?

A. Yes.

Q. And you also determined that there was no correlation between someone's job performance rating and his age, did you not?

A. That's correct.

Id. at 2259

The second GM policy theorized to constitute unlawful age discrimination was the insulation of recent college graduates

and graduates of the General Motors Institute from job reductions. This policy was evidenced by two documents-the so-called "Fuller letters"-written by Stephen Fuller, GM's vice-president of personnel administration and development staff.

Employee transfer schemes were used in tandem with both the secret rating system and the insulation of recent graduates, plaintiffs allege. To prevent a younger employee's reduction, GM would rotate him either within or between departments, depending upon the situation at hand. If slots were unavailable, younger employees alternatively would be placed in the personnel department or on training budgets, often only to be returned to manufacturing

and service departments at a future time.

At the close of plaintiffs' case, GM moved the court to direct a verdict against fifteen[4] plaintiffs. The motion addressed two alleged shortcomings in the cases of the relevant plaintiffs: failure by plaintiffs Collins and Johnson to establish any monetary loss resulting from their respective job reductions, and failure by all fifteen of the plaintiffs embraced by the motion to offer proof that

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[4] Allen, Bailey, Bales, Boles, Collins, Davison, Dodd, George, Harper, Johnson, Landers, McGinnis, Mitchell, Roberson and Williams. (GM also moved against plaintiff Ford, whose case was consolidated with the others for trial purposes only; a verdict was, in fact, directed against Ford whose appeal is the subject of Ford V. Gen'l Motors Corp., No. 79- 2186, slip op.p.11225,____ F.2d____(5th Cir. 1981), which we also decide today.)

they were replaced by persons outside the age group protected by the ADEA.[5] The district court granted the motion as to plaintiffs Collins and Johnson[6] but declined to rule on GM's broadside attack on the evidence presented by the other plaintiffs. The district court indicated it would take the latter motion under ad-

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[5] At all times relevant to this trial the protected age group was 40-65. See Pub.L.No.90-202, § 12, 81 Stat. 602. Congress, however, in 1978 amended the Act to set the upper limit at age 70. See 29 U.S.C.A. § 631(a)(Cum.Supp.1980)

[6] We understand from the record, see Record, No. 79-2857, Vol. XV, at 2350-53, that verdicts were directed against both Collins and Johnson as to legal relief only. At the time of the directed verdict, the district judge had not yet considered the issue of injunctive relief.

visement and would reconsider it on motion for judgment non obstante veredicto or new trial, should the outcome of the trial necessitate such motions.

As the lengthy and complicated trial neared conclusion, the parties stipulated as to each individual plaintiff, amounts disbursed by GM in layoff or reduction benefits, vacation pay, and unemployment benefits.[7] While the jury clearly was instructed that it was permitted to deduct from a plaintiff's back pay award amounts actually received in unemployment benefits, the jury was not instructed on the hand-

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[7] At trial, the district court reserved decision on whether potential jury awards should be reduced by amounts of vacation pay.

ling of "vacation pay" in the damages calculus. In fact, plaintiffs attempted to admit the testimony of Dick Wintersteen, who was prepared to testify inter alia that vacation pay is actually "earned" by an employee in the year preceding its grant. The trial court, however, refused to permit this testimony.

Following trial of the issues, the jury returned a verdict awarding back pay and liquidated damages to all seventeen remaining plaintiffs. GM moved for new trial or judgment N. O. V. The district court on June 19, 1979 entered judgment denying the motion for new trial but granting in part the J. N. O. V. motion by ordering amounts received as vacation pay

by each successful plaintiff deducted from his award of back pay and liquidated damages. Because ten of the plaintiffs had accrued vacation time that translated into monetary payments in excess of their back pay awards, the district court's partial grant of the J. N. O. V. motion stripped those ten of their jury awards. At this point, two important issues still remained for the district court's consideration: injunctive relief and attorneys' fees. The district court held hearings on these issues respectively on July 18 and November 1, 1979.

At the July 18, 1979 hearing, the question before the district court was whether to grant plaintiffs' request for a

permanent injunction against GM. Rather than introduce new evidence, plaintiffs relied on all evidence actually admitted in the earlier jury trial, which, of course, principally dealt with discriminatory events alleged to have occurred in 1974 and 1975. At this hearing, GM, however, did successfully introduce-over plaintiffs' objections-a 1977 edition of its booklet "Working with General Motors." The booklet had been excluded at the jury trial when proffered by plaintiffs in light of GM's relevancy objections: the 1977 policy manual had nothing to do with the 1975 job reductions at issue before the jury. GM also produced at this hearing a witness, Robert P. Surowiec, the

Doraville plant's personnel director. Surowiec explained that the 1977 booklet, "Working with General Motors," outlined the official GM employee appraisal process and work-reduction policies applicable to salaried employees. This new policy led the district court to conclude that the alleged discriminatory approach taken by the "Fuller letters" was no longer in force. Accordingly, on September 5, 1979, the prayer was denied.

Later that month, on September 28, plaintiffs moved for an award of $126,-640.00 in attorneys' fees, attaching to their motion an itemized list of attorney and paralegal hours spent on the case. Attorney time alone exceeded 1800 "bill-

able" hours. In advance of the November 1, 1979 hearing on this issue, plaintiffs served a subpoena duces tecum upon GM and its counsel King & Spalding, requiring production of the defense bill for representation in this litigation. GM's motion to quash was granted by the district court at the outset of the hearing. At the attorneys' fees hearing, the district court expressed some reservations about the itemized bill and stated that its admission was "provisional." The difficulty with the bill lay in its method of preparation. One of plaintiffs' attorneys, Bruce P. Duncan, testified that handwritten notations of time spent on the case were kept in a folder for about four years

until January 1979, when the contents of the notations were dictated to a secretary who typed the data into an automatic "memory" typewriter. Not a single original handwritten notation survived this automized procedure. The district court, by order of February 8, 1980, declared plaintiffs were entitled to an attorneys' fee award of $14,669.85 in keeping with the original representation contract to which plaintiffs and their counsel had agreed.[8] From the judgment of February

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[8] "[P]laintiffs' counsel," wrote the district court, "were retained under a contract providing for a fee equal to the greater of forty percent of all amounts recovered by their clients, which amounts to $14,669.85, or such amount as this court might award as a reasonable fee." Record No. 80-7192, at 94.

11, plaintiffs have appealed to this Court.

## II. Jurisdictional Matters

[1] GM has directed the Court's attention to a potential jurisdictional defect in the appeals of two plaintiffs, Collins and Johnson. Cf. note 6 supra. Verdicts were directed against these two plaintiffs and judgments entered against them on March 16, 1979.

Collins, without Fed.R.Civ. P.54(b) certification,[9] filed an appeal to this Court on April 4, 1979. Although we dismissed the appeal on July 17, the district court had on June 19 entered partial judgments N. O. V. on the successful claims of the other plaintiffs. In response

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[9] In his "Brief in Support of Plaintiff's Motion to Expand Time for Transmitting the Record," filed in the district court, Record, No. 79-2837, Vol. XV, at 5144, Collins stated that because of the entry of judgment against him, he was "forced into the position of having to file a Notice of Appeal immediately." His fear was that if the district court did not include him within the reach of injunctive relief, he would be regarded as having been dismissed in toto on March 16. The fear was unfounded Since the March 16 order, in the operative words of Rule 54(b), "adjudicate[d] the rights and liabilities of fewer than all the parties" that order was nonfinal and "subject to revision." See Fed.R.Civ.P. 54(b)

to the June 19 entry, plaintiffs other than Collins and Johnson, noticed appeal (Docket No. 79-2857) on July 6. Probably because Collins' appeal, as of July 6, had not yet been dismissed by our Court, he did not join in the notice filed that day.

As a result of that failure, GM argues that we are without jurisdiction to consider points raised by either Collins or Johnson. "Plaintiff Johnson," GM states in brief, "did not file a Notice of Appeal." Following dismissal of Collins' appeal, GM asserts he "did not file a subsequent notice." These statements are inaccurate. Both Collins' and Johnson's names appear on the notice of appeal filed with this Court on February 20, 1980. See

Record, No. 80-7192, at 103. Because all prior orders of the district court were "subject to revision," see Fed.R.Civ.P. 54(b), i.e., interlocutory, Collin and Johnson preserved their appeals through that notice.

Two aspects of this notice of appeal still, however, warrant some attention. First, the appeal represented by the February 20 notice is separately docketed No. 80-7192. While this suggests a distinction between its subject matter and the subject matter of No. 79-2857, the two appeals merely represent different stages of the same district court case. Moreover, the assignment of a docket number to an appeal is a ministerial, reflexive

act performed by the Clerk "[u]pon receipt of the copy of the notice of appeal and of the docket entries," Fed.R.App.P. 12(a); it does not affect federal appellate jurisdiction. Second, the notice refers to judgment "entered on February 11, 1980, said Judgment appearing to have been the Final Judgment in the case" as the subject matter of the appeal. The quoted language, taken together with the requirement of Fed.R.App.P. 3(c) that the notice of appeal "designate the judgment, order or part thereof appealed from," might suggest that the notice applies exclusively to the February 11, 1980 judgment. This interpretation would, of course, limit Collins' and Johnson's

appeals to the February 11, 1980 order, which dealt only with attorneys' fees. But our precedents exact a contrary interpretation under the facts at hand. In In Blitzstein v. Ford Motor Company, 288 F.2d 738 (5th Cir. 1961), we held, in determining whether a party complied with the almost identical language of Rule 3(c)'s predecessor, Fed.R.Civ.P. 73(b), that the Court "may look to 'the statement of points and designation of contents of record on appeal,'" 288 F. 2d at 740 (citations omitted). Our study leads us to the conclusion that the February 20 notice of appeal is all-embracing as

to issues and parties.

## III. GM'S Cross-Appeal

GM, on cross-appeal, has leveled a penetrating attack upon the district court's conception of a prima facie showing under the ADEA and the facts of this case. The incisive nature of GM's argument logically compels us to hold plaintiffs' appeal at bay while we consider GM's assertions. The argument has

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[10] Liberal application of Fed.R.App.P. 3(c) (Content of Notice of Appeal) is not to be confused with our traditionally strict reading of the timeliness requirement of Fed.R.App.P. 3(a) & 4(a). Phillips v. Insurance Company of North America, 633 F. 2d 1165, 1166 (5th Cir. 1981); see Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed. 2d 521 (1978).

three components; each applies to a different-albeit overlapping-subset of the nineteen plaintiffs. First, GM charges the district court with error in failing to require each plaintiff to demonstrate that he was replaced by an individual outside the "protected age group." Second, GM argues that each plaintiff should have been required either to show that he was considered for a job later filled by a younger person, or that GM "consciously refused" to consider him for jobs for which he qualified. Third, GM claims that the "cumulative effect" of the alleged incidents of district court error "produced substantial prejudice" to GM and requires reversal. With this outline of GM's argument at hand, we now turn for

illumination to the purposes of the ADEA and to the legal precedents developed thereunder.

A. Statutory History

In a special message to Congress on January 23, 1967, President Johnson urged enactment of a law that would eliminate what he regarded as "a serious-and senseless-loss to a nation on the move." 1 Public Papers of the Presidents of the United States: Lyndon B. Johnson, at 37 (1968). His target was well-defined: "arbitrary age discrimination." Id. at 32. Two years earlier the Labor Department had studied problems associated with aging and had estimated their effect, namely, to bar entry attempts by 50 percent of all applicants to the private job

market. Id. at 37. See H.R.Rep.No.805, 90th Cong., 1st Sess. reprinted in [1967] U.S.Cod Cong. & Admin.News 2213, 2214.

Congress reacted swiftly to the President's message. It considered the Labor Department's study, the experiences of 24 states that already had enacted age discrimination legislation, and the testimony of witnesses, see Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967); Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong., 1st Sess. (1967). By the first week of December

1967, a bill to be known as the "Age Discrimination Act of 1967" had passed both houses of Congress; soon thereafter, President Johnson signed it into law with an effective date of June 12, 1968.

The ADEA is a straightforward and lucid enactment. Its provisions include a mandate for public education on employment of persons in the protected-age category, a prohibition of age discrimination with certain express exceptions, an enforcement mechanism-private as well as governmental, and in intergovernmental deferral scheme to ensure that the federal Act would complement rather than thwart state enforcement in those jurisdictions with similar state statutes. All of these provisions were designed, in the words of Congress,

"to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1976); see Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 228-29 & n.11 (5th Cir. 1976). Explicit in the Act is the general premises that age is an unlawful factor upon which to base employment decisions among job applicants, or as in the case at hand, job incumbents.

B. Case Law

Since our decision in Hodgson v. First Federal Savings & Loan Association, 455 F.2d 818 (5th Cir. 1972), the maiden age

discrimination case in this circuit, we have had few occasions to address squarely the elements of a prima facie ADEA case. Much of our thinking on that score has been molded by McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a race-discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.(1976). In McDonnell, respondent Green had been "laid off in the course of a general reduction in petitioner's work force," 411 U.S. at 794, 93 S.Ct. at 1820; petitioner's refusal to rehire Green precipitated the suit. A prima facie case by a Title VII plaintiff should include four elements, the Court held:

(i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants;

(iii) that, despite his qualifications, he was rejected; and

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802, 93 S.Ct. at 1824 (footnote omitted). The factual variety of Title VII cases, however, prompted the Court to caution that "specification ... of the prima facie proof required from this respondent is not necessarily applicable in every respect to differing factual

situations." Id. at 802, n.13, 93 S.Ct. at 1824.

The ADEA is, of course, a statute independent of Title VII. Congress chose not to amend Title VII to include "age" as a protected category but rather enacted a specific statute that, in certain important respects, parallels Title VII. The significance of the statutes' similarities and differences has confounded the courts, as one commentator has observed:

> Courts that have decided cases under the ADEA ... have vacillated in the degree of protection which they have afforded to older workers. While some have applied the precedents developed under Title VII, others have reached results which seem inconsistent with

> Title VII decisions; indeed [the Sixth Circuit] has explicitly held that the existence of a separate statute indicates the propriety of imposing a less rigorous degree of judicial scrutiny.

Note, The Age Discrimination in Employment Act of 1967, 90 Harv.L.Rev. 380, 382 (1976) (footnotes omitted). On the prima facie case issue, our Court was for several years cautious not to assume McDonnell's applicability outside the Title VII area. E. g., Lindsey v. Southwestern Bell Telephone Company, 546 F.2d 1123, 1124 (5th Cir.1977) (applicability "is presently unclear"); Wilson v. Sealtest Foods Division of Kraftco Corporation, 501 F.2d 84, 86 (5th Cir. 1974) (noting "much debate" by parties over

applicability but declining "to rely solely upon McDonnell").

However, two subsequent decisions of this Court in effect adopted the McDonnell Douglas factors as an appropriate test of a prima facie case under the ADEA. Price v. Maryland Casualty Company, 561 F.2d 609, 612 (5th Cir. 1977); Marshall v. Goodyear Tire & Rubber Company, 554 F.2d 730, 735 (5th Cir. 1977). Both cases cited McDonnell Douglas as a pathfinder. Marshall, though, clearly acknowledged that "McDonnell Douglas [did] not establish an immutable definition of a prima facie case," 554 F.2d at 735. We further observed in Marshall that the McDonnell Douglas Court itself had recognized the factual variety of discrimina-

tion cases and the corresponding need for a flexible view of a prima facie discrimination case. Still, in Price we set out four sufficient but not exclusive elements of a prima facie case under ADEA: "Thus, to show a prima facie case of age discrimination, the plaintiff must show that (1) he was a member of the protected group, (2) he was discharged, (3) he was replaced with a person outside the protected group, and (4) he was qualified to do the job." 561 F.2d at 612.

Discrimination exists, to be sure, "in forms as myriad as the creative perverseness of human beings can provide," McCorstin v. United States Steel Corporation, 621 F.2d 749, 753-54 (5th Cir. 1980). That the prima facie elements of

Price were inapposite to a genre of age discrimination cases first became apparent in the district courts. E.g., Moore v. Sears, Roebuck & Company, 464 F.Supp. 357 (N.D.Ga.1979). In Moore, as in this case, a defendant corporation as part of a massive personnel reduction eliminated the positions held by plaintiffs. There, the district court correctly "perceive[d] ... the notion of a prima facie case in a discrimination action [as] a fluid one." Id. at 362. While we will of course apply the Price elements in proper cases, we have clearly held that they do not constitute "the alpha and omega of possible tests" under the ADEA. McCorstin, supra, 621 F.2d at 753. Reduction-in-force cases are obviously outside the embrace of Price

since reduction-case plaintiffs are simply laid off and thus incapable of proving the third Price element, i.e., actual replacement by a younger employee. But it is beyond peradventure that a statute which expressly endeavors "to prohibit arbitrary age discrimination in employment," 29 U.S.C. § 621(b) (1976), in fact covers reduction-in-force cases.

C. Specific Contentions on Cross Appeal

1.

[2] GM's first charge, that the district court's failure to require each plaintiff to demonstrate actual replacement by an individual outside the "protected age group" constituted error, is easily dismissed in light of our

earlier discussion of Price and McCorstin. Even in the absence of one-for-one replacement of an older employee by a younger one, an employer can with marked facility, practice age discrimination in a reduction-in-force scenario. Thus an ADEA plaintiff under such circumstances need not show actual replacement. See Part III. B. supra.

GM's major contention[11] on cross-appeal is that its legal obligation under the ADEA "is to make a fair and non-discriminatory choice between those persons who were actually considered for a position."

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[11] GM has also raised other points on cross-appeal. Notably, GM has charged that the cumulative effect of several alleged district court errors irreparably prejudiced defendant's case. To some extent where relevant, we have combined arguments on that point with our discussion of what we consider GM's "major contention." We regard it important however, to briefly address and dismiss one additional contention GM raises, namely, the allegation that the district court erred by preventing GM from examining its own "managing agents" when called by plaintiffs to testify on cross-examination. This action by the district court was within its discretion, of which we find no abuse. See Fed.R.Evid. 611(a). GM later was afforded the opportunity to call its managing agents and was not prejudiced by the district court's actions.

Most of the legal argument supporting this contention is obstinately cast in terms of a job replacement case, reflecting GM's refusal to concede that the facts sub judice constitute a paradigm "reduction-in-force" case. Nonetheless, the specific errors that GM asserts, namely, the district court's refusal to sustain this position in the court's decision on GM's directed verdict motion, and the district court's refusal to charge the jury along the suggested lines, merit our serious consideration.

Rephrasing the contention to conform to the facts as we see them, GM argues, in effect, that an ADEA plaintiff should be required in a reduction-in-force setting to show that defendant consciously refused

to retain plaintiff as an employee because of his age. This showing would be satisfied if plaintiff introduced evidence that during a reduction defendant consciously refused to retain plaintiff in his present position because of his age or consciously refused to consider relocating plaintiff within the enterprise because of his age. GM advocates a "conscious refusal" standard to avoid the type of proof introduced in the trial of this case. Rather than requiring plaintiffs to present evidence of discriminatory intent, the district court, GM asserts, permitted testimony as to the general "interchangeability" of plant jobs to suffice. GM further suggests that merely because a plaintiff testifies he was capable of handling one or two or

many salaried jobs other than his own, yet was not relocated to such a job during the reduction, is not enough to show violation of the ADEA. We agree with this argument in principle and accordingly reverse on this point. We delineate precisely the extent of our agreement and the considerations that should govern subsequent similar cases.

D. Prima Facie Showing in Reduction Cases

[3] Drawing upon Price, McCorstin, and the legislative history of the ADEA, we hold that a plaintiff in this job reduction case could have established a prima facie case by: (1) satisfying the "standing requirements under the statute." McCorstin, supra, 621 F.2d at 753, i.e.,

showing that he is within the protected age group and that he has been adversely affected-discharged or demoted-by defendant's employment decision; (2) showing that he was qualified to assume another position at the time of discharge or demotion; and (3) producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.[12] While the first two requirements have appeared

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[12] We hastily add, however, that these requirements are not etched in granite and they do not beckon fanatic adherence. "The facts necessarily will vary ..., and the specification above of the prima facie proof required ... is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas, supra, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824.

with frequency in age discrimination cases, the third one is tailored to the reduction-in-force facts such as those before us and requires some amplification.

[4,5] The third requirement is based upon our understanding of the duty the ADEA imposes upon an employer. The ADEA mandates that an employer reach employment decisions without regard to age but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group.[13]

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[13] This statement arguably represents a departure from certain principles applied under Title VII, but cf. Texas Dep't of Community Affairs v. Burdine,---U.S.---, ---, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981); it flows, however, directly from the ADEA's legislative history and avowed purpose. Senator Javits, ranking minority committee and subcommittee member during the 1967 Senate hearings on the proposed

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Act, told his colleagues that the effect of the legislation would be to "emphasize the ability and capability of the worker to do the job, rather than his age level ...." Age Discrimination in Employment: Hearings on Age Discrimination Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 28 (1967). The relevant House report clearly declared "[i]t is, of course, not the purpose of this legislation to require the employment, regardless of age, of one not otherwise qualified." H.R. No. 805, 90th Cong., 1st Sess. reprinted in [1967] U.S.Code Cong. & Admin.News 2213, 2220. Moreover, the express purpose written into the ADEA by Congress was "to promote employment of older persons based on their ability ...." 29 U.S.C. § 621(b)(1976). The protection sought to be afforded members of the protected age group then, was that their employers would disregard age in favor of ability as the basis for employment decisions.

The age of a "protected" job applicant or incumbent, then, is accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge. Our third requirement simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

[6-8] To be sure, this can be done in

many ways. Direct evidence of discriminatory intent, e.g., a paper scrap with the notation "Lay-off-Too Old" beside a plaintiff's name, would of course suffice. Circumstantial evidence, be it statistical evidence,[14] evidence of employer subterfuge,[15] or other forms,[16] also would suffice so long as it serves the general pur-

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[14] See Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123, 1124 (5th Cir. 1977) (statistical evidence alone might suffice but statistical evidence presented does not); Hodgson v. First Fed'l Savings & Loan Ass'n, 455 F.2d 818, 823 (5th Cir. 1972) (statistics plus specific incidents of discriminatory conduct supported findings of an ADEA violation); Schulz v. Hickok Mfg. Co., 358 F.Supp. 1208, 1213 (N.D.Ga. 1973) ("steep decrease" in average age of district managers relevant to prima facie case); Levien, The Age Discrimination in Employment Act: Statutory Requirements and Present Development, 13 Duq.L.Rev. 227, 236-37 (1974). Cf. Rowe v. Gen'l Motors Corp., 457 F.2d 348 (5th Cir. 1972) (Title VII).

We caution, however, that statistical evidence has no magical properties. A district court should consider the extent to which it reasonably supports the theory that the proponent advances. The statistical showing by plaintiffs here, see slip op. p. 11232, pp. ____- ____ supra, was inconclusive at best. Indeed, the expert's admission that as age increased so did likelihood of retention during the reduction supports a proposition diametrically opposed to plaintiffs' case.

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Convincing evidence on this score, for example, would point to an employee-rotation plan that effectively shifted "protected" workers into jobs likely to bear the brunt of a reduction in force. While plaintiffs alleged this in the present case, the district court, we observe, found their evidence unconvincing.

16

GM has urged that recovery be permitted under the ADEA only when a plaintiff has proved he was "individually impacted by a discriminatory decision." We agree but our agreement should not be misconstrued to limit the role of circumstantial evidence in a prima facie case. We do not doubt, for example, that a demoted plaintiff who is within the protected age category and who is qualified for a job other than his on, may introduce statistics so convincing as to suggest reasonably that his demotion was based upon age.

pose of supporting the asserted proposition and excluding other propositions.[17]

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[17] We are obliged to point out several misconceptions of the ADEA evident in the record and related evidentiary admissions that simply did not support plaintiffs' assertion of age discrimination. First, the bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination. Only when those recruits are insulated from reduction at the expense of employees within the protected age group is the ADEA implicated. Second, seniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. This is borne out, to be sure by the simple observation that a 35-year old employee might have more seniority than a 55-year old employee. This confusion between seniority and age discrimination pervaded the trial. Several witnesses testified that their seniority should have assured them more favorable results during the reduction in force. See Record No. 79-2857 Vol. IX, at 441-42; id., Vol. X, at 905. During closing argument to the jury, plaintiffs' counsel further alluded to "seniority,"

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stating: "A lifetime of work at General Motors, ... twenty-five years on the concrete out there working and breaking apart. Is this the reward[:] they have to go against their own employer?" Id., Vol. XIX, at 3038. Even the briefs plaintiffs have filed in this Court contain reference to seniority. E. g., Appellants' Brief in Response to Brief on Behalf of Appellee and Cross-Appellant, at 16 ("The record in the instant case reveals that there were many younger employees with less seniority retained ...."); 17 ("In the presence of the seniority system, defendant does, indeed have the obligation to consider a plaintiff ... if the plaintiff is more senior ...."). We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit.

The motion by GM for directed verdict, and later the motion for J.N.O.V. in full, should have been granted, for plaintiffs have failed to establish a prima facie case under the ADEA, as delineated herein. Accordingly, all entries of judgment in favor of plaintiffs are

REVERSED.[18]

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[18] Entries of judgment against certain plaintiffs on the question of damages (Bailey, Bales, Boles, Collins, Dodd, Harper, Johnson, Landers, McGinnis, Mitchell, Roberson, and Vaughn) are accordingly AFFIRMED.

Our disposition obviates the need to consider numerous arguments advanced on this appeal. Foremost among these are: (1) plaintiff's case for injunctive relief; and (2) plaintiff Murray's "continuing discrimination" argument. Furthermore, as a result of our disposition, we do not consider plaintiffs' attorneys' fees argument but instead must vacate the district court's award of such fees.

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), and 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid mimimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce

this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent

jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

## CERTIFICATE OF SERVICE

I, CHARLES E. MOORE, one of the attorneys for JAMES L. WILLIAMS, L. C. ALLEN, WILLIAM J. BALES, THOMAS COLLINS, ROY DAVISON, RALPH DODD, HAROLD GEORGE, C. J. HARPER, WALLACE HOUSTON, FRANKLIN KYLE, WILLIAM P. ROBERSON, and HERSCHEL VAUGHN, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of December, 1981, by using BYRON S. ADAMS PRINTING, as my agent, I caused to be served upon counsel of record for defendant, GENERAL MOTORS CORPORATION, three (3) copies of the foregoing Petition for a Writ of Certiorari and the attached Appendix. Said documents were served by

depositing three (3) copies of the same in the United States Mail in a properly addressed envelope with adequate first class postage prepaid, directed to:

WILLIAM A. CLINEBURG
KING & SPALDING
2500 TRUST COMPANY TOWER
ATLANTA, GEORGIA 30303.

This 11th day of December, 1981.

Charles E. Moore

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